Supreme Court, U. S.
FILED
MAR 14 1972
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
January Term, 1972

No. 71-851

JOHN PAUL WRENN,
Petitioner,

V

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

Petitioner, was recently tried and convicted of the felony possession of marijuana in the Wake County Superior Court Division of the General Court of Justice of the State of North Carolina, 68-CR-234. From the imposition of sentence petitioner gave notice of appeal to the Court of Appeals of North Carolina wherein Judgment was affirmed (No. 711OSC410) *State v. John Paul Wrenn*. Petitioner then filed a Petition for a Writ of Certiorari in the Supreme Court of North Carolina, which was denied by order of the Court in conference on October 5, 1971. (No. 106, Fall Term 1971).

From the Judgment below, petitioner has filed this petition for a Writ of Certiotari to the North Carolina Court of Appeals in the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U. S. C., Sec. 1257(3).

QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN PERMITTING THE INTRODUCTION OF EVIDENCE WHICH WAS OBTAINED PURSUANT TO A SEARCH AUTHORIZED BY A SEARCH WARRANT?

II. DID THE TRIAL COURT ERR IN PERMITTING THE INTRODUCTION OF EVIDENCE OF STATEMENTS MADE BY THE PETITIONER DURING THE COURSE OF THE SEARCH?

III. DID THE TRIAL COURT ERR IN DENYING THE PETITIONER'S MOTION TO QUASH THE INDICTMENT?

CONSTITUTIONAL PROVISIONS INVOLVED

1. *U. S. CONST. amend. IV:*

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

2. *U. S. CONST. amend. VI:*

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed

of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. *U. S. CONST. and XIV, 1:*

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

The petitioner, John Paul Wrenn, was charged in a bill indictment with illegal possession of a narcotic drug, marijuana. Petitioner was tried at the February 1 Special Session, 1971, of the Wake County Superior Court before His Honor Coy E. Brewer, Judge Presiding, and a jury.

Upon being arraigned, petitioner moved to quash the warrant. This motion was denied. At the close of the evidence for the State, petitioner moved for a Judgment as of nonsuit. This motion was denied. The petitioner offered no evidence and renewed his motion for Judgment as of nonsuit. This motion was denied.

This case was then submitted to the jury and a verdict was returned by the jury finding the petitioner guilty as charged. The petitioner's motions to set aside the verdict and for a new trial were denied.

Judgment was entered by the Court that the defendant be imprisoned for a term of not less than one year or more than two years in the State Prison with a recommendation this term of imprisonment be served under the work release program. The petitioner thereupon gave notice of appeal to the North Carolina Court of Appeals in open court.

By opinion dated August 4, 1971, the North Carolina Court of Appeals found no error and affirmed petitioner's conviction.

On August 25, 1971, petitioner filed with the North Carolina Supreme Court made Petition for Writ of Certiorari to the North

Carolina Court of Appeals. The petition of the petitioner was denied by the Supreme Court of North Carolina in conference on the 5th day of October, 1971.

Petitioner has now filed a Petition for a Writ of Certiorari in this Court to review the order of the North Carolina Court of Appeals (No. 711OSC410, dated August 4, 1971).

STATEMENT OF FACTS

On July 15, 1968, defendant resided in a duplex apartment in Knightdale, North Carolina. On that date law enforcement officers served a search warrant on the defendant at his residence for the purpose of searching for marijuana. Defendant lead the officers to an upstairs bedroom and pointed out vegetable material in a bowl and some in a bag. The contents of this bowl and bag were identified by a chemist as 154 grams of marijuana. During the course of the search marijuana plants were found growing in defendant's backyard..

ARGUMENTS

I. *THE SEARCH QUESTION*

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO INTRODUCE EVIDENCE WHICH WAS SEIZED PURSUANT TO A SEARCH AUTHORIZED BY A SEARCH WARRANT.

Petitioner here contends that probable cause for issuance of the search warrant was established through the use of illegally obtained evidence. This contention cannot be sustained.

The constitution prohibits only those searches and seizures which are unreasonable. *Carroll v. United States*, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280; *Elkins v. United States*, 364 U. S. 206, 4 L. Ed. 2d 1669, 80 S. Ct. 1437. "Furthermore, under circumstances requiring no search, the constitutional immunity never arises. This principle is aptly stated in 47 Am. Jur. Searches and Seizures, Sec. 20 as follows: 'Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search.

It does not prohibit a seizure without a warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand.'" *State v. Colson*, 274 N. C. 295, 163 S. E. 2d 376, *cert. den.* 393 U. S. 1087, 21 L. Ed. 2d 780, 89 S. Ct. 876. The plain sight doctrine allows the seizure of objects in plain sight of the officer if he has a right to be in a position to see them. *Harris v. United States*, 390 U. S. 234, 236 (1968); *Kerr v. California*, 374 U. S. 23 (1963).

In the case at hand, Agent Starling testified on *voir dire* that he observed the marijuana growing behind the defendant's premises without making an entry upon the land (R.p. 16). He testified that an informant delivered the suspected marijuana to him (R.p. 16); that the informant was a police officer (R.p. 22); that he did not anticipate that the informant was going to obtain it and that he did not tell the informant to obtain it (R.p. 18); that some of the plants were 4 feet tall (R.p. 21); that one informant told him that he had observed certain activity around the plants (R.p. 21); that he was standing some 20 to 30 feet from the plants on a public street and sidewalk and could observe the plants from there (R.pp. 22-23). Thus, the petitioner has no standing to object inasmuch as the State's evidence indicates that the suspected marijuana plants could be seen from a public street and sidewalk and was in fact seen from the street and sidewalk. Therefore, no search warrant would be needed to seize the plants. The probable cause for the issuance of the search warrant was fully and lawfully shown in the affidavit and on the *voir dire* and would certainly pass the scrutiny of *Spinelli v. United States*, 393 U. S. 410 (1969) and *Aguillar v. Texas*, 378 U. S. 108 (1964).

II. *THE CONFESSION QUESTION*

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO INTRODUCE EVIDENCE OF INCRIMINATING STATEMENTS MADE BY THE PETITIONER DURING THE COURSE OF THE SEARCH.

Petitioner contends that certain incriminating statements made by him to the arresting officer should be excluded since they were obtained from the petitioner as a result of an illegal search. The State concedes upon the authorities set out in petitioner's brief,

that if the search was illegal then these statements would be inadmissible. However, the State again asserts that the search warrant is valid and incorporates herein the arguments set forth in its first argument in support thereof.

III. *THE SPEEDY TRIAL QUESTION*

THE TRAIL COURT DID NOT ERR IN DENYING THE PETITIONER'S MOTION TO QUASH THE BILL OF INDICTMENT.

Petitioner assigns as error that the trial judge denied his motion to quash the indictment. The minutes of the Court show the following: "2/1/71 Upon the calling of this case for trial, defendant through counsel, Carl Churchill, made a motion to quash the bill of indictment. Motion denied." The Record on Appeal discloses no grounds for the motion, nor any evidence in support of any grounds to quash the indictment. For the first time, in his brief, petitioner undertakes to argue that the indictment should be quashed because he was denied a speedy trial. The Record on Appeal shows that petitioner was arrested on 15 July 1968, the same date the search warrant was issued, and that petitioner was tried in February 1971. This passage of time standing alone shows no prejudice to petitioner; so far as you can tell the delay may have been at petitioner's requests.

Prior to *Klopfer v. North Carolina*, (involves the right of a defendant to demand trial after state takes a *nolle prosequi*), 386 U. S. 213 (1966), it seems clear that in order for a defendant to take advantage of a long delay between arrest and trial, he must show that he had demanded trial, that actual prejudice resulted from the delay, and that the delay was deliberately caused by the government. After *Klopfer*, this Court has ruled in *Smith v. Hooey*, 393 U. S. 374 (1969), that upon a request by a prisoner incarcerated in another state, a state with a pending charge must seek to secure his presence for trial where prisoner will not contest extradition, and a delay of six years is unreasonable. Also, in *Dickey v. Florida*, 398 U. S. 30 (1970), this Court held that upon a request by a federally incarcerated defendant, a state with a pending charge against defendant must attempt to secure his presence for trial, and a delay of 7 years was too long. Thus, these two holdings do not

seem to have changed previous requirements inasmuch as these cases only require a state with a pending charge to do more than file a detainer after a defendant has made an initial demand for trial. When a request is filed the state must make reasonable efforts to secure custody.

Thus the *Klopfer and Smith* cases cited by the petitioner are readily distinguishable from the case at hand and cannot be relied on as precedent in a factual situation as presented by petitioner's case.

CONCLUSION

The respondent respectfully requests that for the above reasons that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of March, 1972, three copies of the Answer to the Petition for Writ of Certiorari were personally delivered to Wade M. Smith, Counsel for Petitioner, 835 Insurance Building, Raleigh, North Carolina 27601, J. Harold Tharrington, Counsel for Petitioner, and Roger W. Smith, of counsel, for the Petitioner John Paul Wrenn.

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